U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 12/07/2000

IN THE MATTER OF:	*	
	*	
Andrea Bunnell	*	
Claimant	*	
	*	
Against	*	Case No.: 2000-LHC-1512
	*	
Navy Exchange	*	OWCP No.: 1-142038
Employer	*	
	*	
and	*	
	*	
Crawford & Company	*	
Third Party Administrator	*	

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Richard F. van Antwerp, Esq.
For the Employer/Self Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), as extended by the provisions of the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, **et seq.**, herein referred to as the "Act." The hearing was held on June 2, 2000 in New London, Connecticut, at which time all

parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

EVIDENTIARY ISSUE

At the hearing the Employer offered into evidence the November 10, 1997 and November 25, 1997 reports of Dr. W. Jay Krompinger (EX 2) and the February 23, 1999 report of Dr. Daniel T. Glenney. (EX 3) Claimant objected to the admission of those reports into evidence unless the Employer scheduled, took the deposition of and paid the expense of such deposition. The Employer, on the other hand, submitted that such reports are admissible in these administrative proceedings and that Claimant, as the objecting party, must bear the expense of deposing the doctors. (TR 12-16, 63-74)

This Administrative Law Judge adopted Employer's position and EX 2 and EX 3 were admitted into evidence based upon the landmark decision in **Richardson v. Perales**, 402 U.S. 389 (1971) (the report of a physician is admissible in a Social Security Administration proceeding as long as the opposing party is afforded the opportunity to subpoena and cross-examine the physician at his/her deposition).

The Employer has also offered the reports and labor market survey of Laura C. Whitfield, B.S., M.S. Ed., C.R.P., its vocational rehabilitation expert. (EX 4, EX 5) Claimant also objected to these exhibits unless and until the Employer scheduled and paid for the deposition of Ms. Whitfield. On the other hand, the Employer again submitted that it had no obligation to bear such expense, that the exhibits are admissible and that it was Claimant's obligation, as the objecting party, to bear such expense. (TR 13)

This Administrative Law Judge, treating the reports of a vocational consultant hired by one of the parties, as being different than those of an impartial and unbiased physician, sustained the Claimant's objection and advised the parties that EX 4 and EX 5 would be admitted into evidence once the record

contained the deposition testimony of Ms. Whitfield. (TR 74-75)

Attorney Kelly, by letter dated June 19, 2000 (CX 22), has advised that the parties have been unable to depose Ms. Whitfield as she "is not located in the local area, but rather is in Virginia Beach, Virginia." As Attorney Kelly submits that the depositions of Dr. Kleeman and David Soja will provide rebuttal for the report of Ms. Whitfield and as counsel does not renew her objection to Ms. Whitfield's reports (EX 4, EX 5) and as those reports were provisionally admitted into evidence at the June 2, 2000 hearing, those reports are now admitted into evidence as full exhibits **de bene esse**.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX 6	Attorney van Antwerp's letter filing	06/30/00
EX 7	Claimant's time card and payroll records	06/30/00
CX 22	Attorney Kelly's status report	07/07/00
CX 23	Attorney Kelly's letter relating to Claimant's average weekly wage and filing the	07/07/00
CX 24	June 19, 2000 Deposition Testimony of David M. Soja, CRC, ABVE	07/07/00
CX 25	Attorney Kelly's Fee Petition	07/07/00
CX 26	Mr. Soja's **Curriculum Vitae**	07/07/00

EX 8	Attorney van Antwerp’s letter filing the	08/03/00
EX 9	June 19, 2000 testimony of Barbara A. Kleeman, D.C.	08/03/00

The record was closed on August 3, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On June 9, 1997, Claimant suffered an injury in the course and scope of her employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on October 27, 1999.

7. The applicable average weekly wage is in dispute.

8. The Employer voluntarily and without an award has paid temporary total compensation from July 24, 1998 through September 1, 1999 as well as temporary partial compensation from October 2, 1997 through July 23, 1998 and from September 2, 1999 through the present and continuing at the weekly rate of $103.10.

The unresolved issues in this proceeding are:

1. Whether Claimant’s ongoing disability is related to her June 9, 1997 injury.

2. If so, the nature and extent of her disability.

3. Claimant’s average weekly wage.

4. Entitlement to continued chiropractic treatment and payment of an outstanding bill totaling $2,125.00 for chiropractic treatment as of May 19, 2000.

Summary of the Evidence

Andrea Lynn Bunnell ("Claimant" herein), forty-seven (47) years of age, with a high school education, and who has completed a one year course in 1975 at a California Cosmetology School in hair dressing, hair coloring, hair cutting, etc., has a varied employment history. Claimant moved to Connecticut in 1987, worked as a sales clerk at a department store and in 1990 went to work at the U.S. Navy Sub Base in Groton, Connecticut as a barber. According to Claimant, there were ten (10) barbers in the base barber shop, that she worked from 10:00 a.m. to 6:00 p.m. cutting the hair of military personnel and their eligible dependents. She was given one fifteen (15) minute break and a thirty (30) minute lunch break each day. She worked five (5) days each week, Claimant remarking that she averaged 35-40 haircuts each day. Her pay was based on a fifty (50%) percent commission for each $5.00 hair cut. (TR 23-27)

Claimant began her duties as a barber in the old barber shop and she had no problems with her work. However, in 1993, the barber shop was remodeled and "old-fashioned" barber chairs were installed, **i.e.**, high chairs with arm rests. Claimant, who is 5'4", testified that her work station was low in comparison to the high barber chairs and she had to lift up her arms and shoulders to cut the hair of her clients and, while standing all day long, except for her breaks, she had to twist and turn to reach her barber supplies, Claimant remarking that she always had to work at or above shoulder level. She once experienced the onset of back pain as she had to twist and turn to reach her barber supplies on the counter behind her. She was sent to the Occupational Health Center at the base and she was sent home to rest for three (3) days for her lumbar sprain. She was told to apply ice to the affected area and she returned to her barbering duties as directed. She took aspirin as needed and kept working, although she continued to experience back pain. (TR 28-30)

Other barbers had similar problems with their duties and resulting back pain and Claimant complained to her immediate supervisor. Claimant simply was told "it is too bad" and that she "should get used to it." A complaint was made to OSHA and its investigators came to the base and talked to Claimant and other barbers. OSHA thereupon directed the U.S. Navy to replace those chairs with ergonomically designed barber chairs or be fined. Apparently some of the chairs were replaced but

Claimant's chair was not replaced. She continued to work and continued to experience shoulder and back pain and swelling. The symptoms became so severe that she had to reduce her hours and in January of 1997 Claimant was put on part-time work, **i.e.**, every other day, to see if these decreased hours would help her symptoms. While this helped her on her day off, the symptoms returned when she returned and completed her eight (8) hours. She then decided to seek treatment for her symptoms and she went to see Barbara A. Kleeman, D.C. (TR 31-34)

Claimant's medical problems are best summarized by the report of Dr. Kleeman after her initial examination of the Claimant wherein the doctor, as of June 9, 1997, reports as follows (CX 2-1)

"INITIAL OFFICE EXAMINATION ANDREA BUNNELL

This is an accumulated work comp. Injury. Symptoms escalated and were noted by the patient as of 12/1/96. She sought treatment starting 6/9/97. She was examined at 251 Williams Street in New London.

Subjective complaints were pain in her left buttock, left leg along the anterior and medial borders. The pain is described as burning and achy. She has had very acute pain for several weeks. She has frequent frontal headaches, constant mid back and neck pain. She has radiating pain down her right arm as well as in her elbow and wrist on the right. The pain is improved with rest and is worse after working. She works in a slightly bent position. All of her symptoms are increased after working with her arms elevated. She cuts hair for a living and this is the position she is in 8-10 hours a day.

"EXAMINATION

Examination reveals paravertebral muscle spasm and muscle inflammation throughout the thoracic and cervical spines. Multiple areas of trigger points in the rhomboid and trapezius area were noted.

Orthopedic test are positive for nerve root compression on the right side of her lower neck causing radiating pain down her right arm into her lower forearm and into her wrist. She has inflammation and tenderness in the right elbow. Tendinitis and muscle spasm is noted in the same area. Patrick's Test is

positive on the left side, indicative of bursitis. There is tenderness and swelling at the left sacroiliac joint, indicative of chronic sprain injury. She has tenderness to light palpation in the cervical spine and even light pressure on the suboccipital muscles increases headache pain. All ... symptoms have greatly worsened in the last 30 days.

In the last six months she has tried to take medicine in order to tolerate the pain. The medicine is not giving her as much relief as it used to and the symptoms are increasing.

Structural examination shows multiple areas of subluxations, particularly in the lower cervical spine, mid-thoracic spine, left sacroiliac joint and lower lumbar areas. All orthopedic tests for left sacroiliac involvement are positive. All orthopedic tests for cervical facet and foraminal encroachment on the right side are positive.

“DIAGNOSIS

Acute exacerbation of chronic lower cervical sprain, thoracic sprain, left sacroiliac sprain, right brachial neuralgia, moderate tennis elbow and right carpal tunnel syndrome. It is my professional opinion that these injuries are a result of accumulated injury at work.

“TREATMENT

Conservative treatment twice a week for 6-8 weeks is suggested. At home cryotherapy, rest and reduced work hours is suggested. The patient was given a calcium supplement and collinsinia root for ligament support. She was given two cold packs in order to use cryotherapy at home. Her next treatment should be scheduled on 6/16/97.”

Dr. Kleeman has continued to see Claimant as needed between June 16, 1997 and May 19, 2000 and the progress reports are in evidence as CX 2 at 2-35 and the doctor states as follows in her May 19, 2000 report (CX 2-35):

“Subjective: On today’s visit, the patient reported her neck pain and discomfort is showing a definite increase in severity. She is under a great deal of stress as she finishes school for this semester, anticipates new classes in the summer and still has serious financial stress as a result of this injury and lack of cooperation and withdrawal of appropriate support from

worker's compensation carrier.

"Andrea continued to describe that she noticed constant moderately severe achy pain localized in the right deltoid area, right posteriorlateral biceps, left lower lumbar area, and right lower lumbar area. The neck pain intensity is aggravated by repetitious movements and stress but she finds that taking pain pills, reclining, and hot showers makes her feel better. She further reports the bursitis in the hip has been a little better since the last visit. Andrea states that the headache pain has been a little better since the last visit. She also reports that the spasticity of the upper back muscles has been feeling slightly better.

"Objective: Tonicity of the muscles was tested and a severe amount of hypotonic muscle contraction in the suboccipital muscles, cervical paraspinal muscles, mid thoracic muscles and gluteal muscles was elicited. An analysis of the spinal tissues by digital palpation showed a severe pain intensity at C1-C2, C7, T5-T8, L5, and the right ilium bilaterally.

"Assessment: The status of this patient's condition is chronic and permanent.

"Plan: The patient is scheduled to return once a week for the next 3 weeks. To increase functional mobility and correct segmental misalignment, adjustment was administered to the area of the thoracic spine, lower lumbar region, and area of the cervical spine. Treatment consisted of trigger point therapy to the right lateral thigh area, in order to relax effected muscles and promote circulation," according to the doctor.

Dr. Kleeman referred Claimant for a Neurological evaluation by Dr. Lawrence I. Radin and the doctor, after the usual social and employment history and the neurologic exam, gave the following impression as of January 15, 1998 (CX 3-2):

"IMPRESSION: Forty four year old left handed white female with recent onset migraine with aura. The patient's main contributing factor is likely a high level of stress due to various psycho social factors. She is quite anxious appearing and, in fact, likely is depressed as well. She feels that in general her level of enjoyment of life, appetite and sleep are quite affected and admits to feeling depressed. She had seen a counselor in past years after her divorce. I have recommended that she resume counseling and have offered a short course of

anxiolytics with Ativan .5mg TID for the next 10 days. It may be that she should be on an anti-depressant, however, she is reluctant to do so. She should have a screening head CT which I would expect to be fully normal as is her screening examination."

The parties deposed Dr. Kleeman on June 19, 2000, the transcript of which is in evidence as EX 9. Dr. Kleeman forthrightly reiterated her opinions and these opinions withstood cross-examination by Employer's counsel. (EX 9 at 3-30)[1]

Dr. Kleeman has also referred Claimant for an orthopedic evaluation and Jeffrey A. Miller, D.O., after the usual social and employment history, his review of her diagnostic tests and the physical examination, concluded as follows in his October 5, 1998 report (CX 4-2):

"Diagnosis: Chronic right shoulder bursitis and probable left greater trochanteric bursitis with associated left sacroiliac joint dysfunction that may be related to the position that she sustains during her work activities.

Her examination and history is consistent with chronic right shoulder bursitis which would relate to repetitive trauma as seen in her type of job. Her greater trochanteric bursitis is also reasonably associated with her type of job duties. I have suggested a short course of physical therapy focusing on range of motion and rotator cuff strength straining as well as the use of ultrasound treatments to her left hip and iliotibial band flexibility exercises. Although she has not been working since last April, I do believe that she is employable as of today, though I would restrict her against repetitive motions of her upper extremities as well as lifting greater than even a few pounds frequently above the level of her shoulder. She should be restricted against all overhead work. Lifting with her right upper extremity should be restricted to no greater than 20 lbs. Occasionally. She should be allowed to alternate between sedentary and ambulatory work activities as well as be allowed time to complete an outpatient physical therapy program. At the

[1]Objections to certain of Dr. Kleeman's testimony by both counsel are overruled as the answers are relevant and material herein, are not unduly cumulative and the objections really go to the weight to be accorded to the doctor's opinions.

present time, she states her work restrictions are in effect as per Dr. Kleeman. Ms. Bunnell's follow-up with us will be in six week's time to assess her program."

Claimant was sent the following letter by her Employer on June 23, 1999 (CX 5):

"From: General Manager, Navy Exchange, NSB New London
To: Ms. Andrea Bunnell, Barber

Subj: 30-CALENDAR DAY ADVANCE NOTICE OF PROPOSED TERMINATION

Ref: (A) Navy Exchange Manual, Vol,3, Pub 145

1. In accordance with reference (a), this is to notify you that we propose to terminate your employment no earlier than 30 calendar days from the date you receive this notice because of your inability to perform the job duties of your position as Barber.

2. Our records indicate that you have been absent from work since 23 March 1998 and that you exhausted your sick leave allowance on 23 July 1998. The last medical certification received from Dr. Daniel T. Glenney, M.D., dated 23 February 1999, regarding your status indicated that you can return to work with permanent restrictions to include avoidance of prolonged sitting and standing still, limited intermittent bending, squatting, kneeling, crawling, and climbing, and a 30 pound lifting restriction. Although you are able to work with some physical limitations, there are no positions available which meet your physical limitations.

3. Reference (a) provides that you may respond to this notice orally and/or in writing to the undersigned within 10 calendar days from receipt of this notice. Any response will be given due consideration. A written decision will be issued within 10 calendar days after receipt of your reply, or after expiration of the ten calendar days limit, if you do not answer.

Claimant's Employer sent her a letter on July 16, 1999 wherein she was advised that her "employment with the Navy Exchange, NSB, New London, will be terminated (on July 29, 1999) because of prolonged absence due to (her) extended disability" in accordance with the provisions of the "Navy Exchange Manual, Vol 3, Pub 145, Chapter V." (CX 8-5)

As Claimant was now without a job she sought retraining in another field and assistance from the OWCP's Vocational Rehabilitation Unit and she was referred to David M. Soja for follow-up by letter dated July 14, 1999. (CX 6)

Dr. Kleeman issued the following work restrictions on July 27, 1999 (CX 7):

Due to work-related spinal injuries Ms. Bunnell is restricted to working part-time in one of the following ways:

6 hours/day/4 days/week
or
4 hours/day/5 days/week.

She will eventually be able to increase hours, if her symptoms do not increase with one of the listed schedules.

She is restricted to lifting no more than 10 lbs.,
intermittent standing, sitting, and walking.
No more than one hour of standing or sitting at a time.
No working over-head or in awkward positions.
No twisting or bending with lifting.
No walking over 20 minutes without sitting to reduce strain on low back.

Repetitive motion using arm and shoulder, restricted to 1 hour at a time. All work above shoulder level should be avoided or limited.

No climbing of ladders or stairs, with the exception of one flight to get to or from work-place.

No working in a position that extends or flexes cervical spine for prolonged time periods," according to Dr. Kleeman.

David M. Soja, CRC, ABVE, a Vocational Rehabilitation Consultant, by letter dated July 27, 1999, referred Claimant for a Psycho-educa/vocational Assessment by Christopher Tolsdorf, Ph.D., of Psychological Associates. (CX 8-2)

Mr. Soja's Vocational Rehabilitation Report, dated July 30, 1999 and in evidence as CX 9, reflects that "Ms. Bunnell is a highly motivated individual anxious to begin the VR (vocational rehabilitation) process despite her compensable and unrelated medical limitations involving pain and loss of motion."

Mr. Soja and Dr. Tolsdorf agreed that Claimant should be retrained for work "dealing with the public" (CX 10-4) and it was also agreed that Claimant would attend Three Rivers Technical Community College (TRTC) and take the appropriate courses to be retrained for work in hotel management. (CX 10 at 1-16)

The appropriate registration forms were completed (CX 11) and Mr. Soja advised Dr. Kleeman of the retraining anticipated for Claimant and he asked the doctor's opinion as to whether or not Claimant's use of keyboards of computers might aggravate her symptoms. (CX 12)

Mr. Soja's November 12, 1999 report again reflects that retraining for work in hotel management would be appropriate (CX 13) and he sent to Claimant's attorney the following letter on November 16, 1999 (CX 14):

"I just received the attached correspondence from Dr. Kleeman, regarding our mutual client.

"Would you kindly review Dr. Kleeman's letter and send it to the proper individuals who control the employee's workers' compensation income. Kindly request of them, in spirit of good faith, that they reinstate Ms. Bunnell's W-Comp income in full, pay her on a regular and timely basis and eliminate the outside influence of the labor market provider who requests that Ms. Bunnell seek jobs, while she in involved with active Voc-Rehab.

"Under separate cover, first class mail, I sent you a very detailed VR progress report dated 11/12/99."

Mr. Soja issued an additional report on December 13, 1999 (CX 15) and I note the following statement in justification of the retraining program designed for the Claimant (CX 15 at 4-5):

"**JUSTIFICATIONS:** Ms. Bunnell suffers several musculoskeletal conditions cumulatively resultant from poor ergonomics at her place of employment while employed as a hair stylist. Her employer The Navy Exchange has no suitable light duty and does not want her back. The IW (injured worker) has permanent light duty work restrictions, part-time in nature for the next 18 months according to Dr. Kleeman, her long-term treating chiropractor.

Comprehensive testing by Dr. Tolsdorf finds that Ms. Bunnell has the potential academic training at the certificate level in training dealing with the public.

Vocational exploration found that Ms. Bunnell had a natural inclination towards the hospitality industry.

Labor market survey found there were jobs available in sufficient numbers in the hospitality industry for the position of Hotel manager (187.117-038) or Sales representative, hotel services (259.157-014) at starting wages of $20 - $25K in the CT economy.

Without skills training, Ms. Bunnell has a present WEC of $7.00/hr or $280./wk full time. She is however released only to part-time work which makes her present WEC $140.00/wk.

The IW is motivated and has participated fully in her prevocational training program at TRCTC, a uniquely qualified CT training facility, that previous LHWCA clients have done well at.

TRCTC offers a suitable vocational training program for Ms. Bunnell. They will work within Dr. Kleeman's restrictions. The program will begin 01/00 and projected completion is following the Spring 2001 semester, June 2001.

Dr. Kleeman recently prepared a strong letter of support for her patient to engage with hotel management training on a part-time basis and predicts within 18 months Ms. Bunnell should be physically capable to engage in full time work.

A status change to vocational training is recommended. The OWCP forms are attached for RS review and approval."

Mr. Soja reported on Claimant's academic progress in his February 18, 2000 report (CX 16) and Claimant, cooperating with these retraining efforts, agreed to take several summer courses so that she might complete her course requirements prior to the end of 2000. (CX 17)

Mr. Soja's most recent report is dated May 22, 2000 and again he recounts Claimant's academic progress, especially her plans "to attend school four days per week this summer" and her plans "in job shadowing or practicum opportunities" at a hotel in the New London, Connecticut area." (CX 20)

The parties deposed Mr. Soja on June 19, 2000, the transcript of which is in evidence as CX 24. Mr. Soja, a well-recognized and pre-eminent vocational rehabilitation counselor who has performed numerous such evaluations for the OWCP, Department of Labor, since 1978 (Deposition Exhibit 1), forthrightly reiterated his opinions and those opinions withstood cross-examination by Employer's counsel. (CX 24 at 28-40)

The Carrier referred Claimant for an examination by its medical expert, Dr. W. Jay Krompinger, an orthopedic physician, and the doctor states as follows in his November 10, 1997 report (EX 2):

"Mrs. Bunnell is a 44-year-old woman seen for an evaluation.

"This woman has worked as a barber over the past 22 years. Initially she worked in California. Over the past seven to eight years she has worked at the Navy Exchange. She states that in November of 1996 she began to develop problems with mid and lower back pain with some pain referable to the top of the left buttock. She was seen at the Pequot Medical Center and x-rays were taken. Thereafter the patient continued to have problems apparently with more central back pain. She states that her general level of pain was associated with the intensity of her working activity. She thereafter developed some right sided pain along the neck and top of the right shoulder. Occasionally there is numbness and tingling involving her right upper extremity. Patient thereafter has started a chiropractic treatment regimen which stared in June of 1997. The chiropractic regimen has consisted of manipulation. The patient also habitually utilizes ice packs to the affected area.

"Her medical history has been significant for an episode of lower back pain sustained in approximately 1993. This apparently was another injury related to her employment. She was seen at the occupational health center and missed a few days out of work. She has had no previous spinal problems. She is a one pack per day smoker. She has no active medical problems.

"EXAMINATION: To assessment today she is a woman of medium build of 5'3" and weighs 140 lbs. Her overall posture is within normal limits. Her cervical mechanics show a full range of flexion and extension. She does have some minor restriction of side bending to the left and to the right. There is a mildly

positive Adson maneuver involving the right upper extremity. Her low back mechanics are quite full. She has a full range of lumbar extension. Side bending is symmetrical. Reflexes are brisk at the knee. She does have a diminished left ankle reflex versus the right side. She does have incisions about the left knee. Straight leg raising is essentially negative bilaterally. Her hip mechanics are full and symmetrical.

"X-RAYS: Plain x-rays were available for review. There is some minor rotation in the lumbar spine There is no major scoliosis. Hip films were not available.

"ASSESSMENT: This woman appears to have some signs consistent with mechanical lower back and neck pain. It would appear likely that her working activity caused an exacerbation of this condition. There are no abnormalities about the hips. She does not have a major spinal deformity. There is no significant lumbar scoliosis. I think her condition would easily be treated with a regimen of physical therapy with an emphasis on active exercises directed to the lumbar spine and upper back and shoulder area. This should continue over a three to four week regimen. Following this treatment she should maintain a good active exercise regimen. There is no other specific treatment that would be indicated for this condition. There are no signs of a permanency and I would not anticipate a permanency to be generated as a result of this condition," according to the doctor.

As of November 25, 1997 Dr. Krompinger opined "that this woman can continue to work as a barber without restriction and can work on a full-time basis." (EX 2-3)

The Carrier has also referred Claimant for an examination by another orthopedic physician and Dr. Daniel T. Glenney concludes as follows in his February 23, 1999 report (EX 3):

"Impression is that of chronic cervical and lumbar strains.

"I will attempt to answer the questions as put forth to me in a letter of February 11, 1999.

"Her diagnosis is chronic cervical and lumbar strains.

"The prognosis under most circumstances would be very good, except that the patient has been dealing with this for 1 ½ years and does not seem to have made progress. Therefore I would say

that the prognosis is fair for recovery.

“I have supplied the history above.

“There are no prior injuries or pre-existing conditions to my knowledge.

“If the medical record supplied by the chiropractor suggests that the onset of pain came on while the patient was employed as a barber, then I relate her low back and her neck complaints to her job as a barber.

“With respect to further treatment, I believe her standard treatment should be anti-inflammatory medication, an exercise program to maintain and improve her motion, weight reduction, avoidance of prolonged sitting and prolonged standing still, limited intermittent bending, squatting, kneeling, crawling and climbing, and a 30 lb. Lifting restriction. I believe these restrictions can be made permanent at this point. I do not believe that further chiropractic treatment will be of benefit at this point.

“I believe the treatment has been reasonable to date.

“Outside of her restricted motion, which I believe is still recoverable, there is no neuromuscular loss of function other than that which comes about through her pain.

“I do believe she has reached maximal medical improvement as of this date of 2/23/99.

“Certainly I believe the patient can work under the restrictions mentioned above.

“The patient’s physical capabilities are likewise mentioned above, **i.e.**, the restrictions.

“Of note is that I am not restricting her shoulder. I believe her shoulder exam is essentially normal. I believe her low back and neck problems can be treated conservatively, as mentioned above, with anti-inflammatory medication, a heating pad, plus or minus a neck collar, plus or minus a lumbosacral corset, a walking program, weight reduction and a calisthenic stretching program. I do not believe she is a surgical candidate, nor will she need surgery in the distant future.

“I do not believe that chiropractic treatment at this time is curative. I do not believe it is necessary as well. Any treatment that has gone on for 3 months, and has not significantly improved the patient’s situation, is not indicated in my opinion.

“I do not believe any further diagnostic studies are indicated, such as MRI’s, CT scans, etc.,” according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer

controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, Claimant must prove that (1) she suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If Claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If Employer presents "specific and comprehensive" evidence sufficient to sever the connection between Claimant's harm and her employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's testimony to establish that she experienced a work-related harm, and as it is undisputed that working conditions existed which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to

rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which severs the connection between the alleged working conditions and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all

factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate her condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 480 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her acute exacerbation of her lumbar, cervical, thoracic and brachial areas, as well as her right carpal syndrome,
resulted from working conditions at the Employer's maritime

facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In fact, as extensively summarized above, the Employer's physicians also agree that Claimant's bodily harm directly resulted from her work at the Employer's base barber shop. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszieicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine &**

Supply Co., 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s repetitive work duties as a barber at the Employer’s facility from 1990 through June 9, 1997 have resulted in impairment to Claimant’s lumbar, cervical, thoracic and brachial areas, as well as her right hand, that the date of injury is June 9, 1997 (CX 1), that the Employer had timely notice of such injury, has authorized certain medical care and treatment and has paid certain compensation benefits to Claimant as stipulated by the parties (TR 8-9) and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975).

Consideration must be given to claimant's age, education, industrial history and the availability of work Claimant can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which she is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that she is unable to return to her former employment because of a work-related injury or occupational disease, the burden shifts to the Employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which Claimant is capable of performing and which she could secure if she diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), she bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that she cannot return to work as a barber. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment, as further discussed below. **See Pilkington v. Sun**

Shipbuilding and Dry Dock Company, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent as she required additional treatment to restore her condition back to the **status quo ante**. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within Claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of Claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that Claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

Claimant is considered permanently disabled if she has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view towards improving her condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if her condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981). Thus, I find Claimant has not reached maximum medical improvement as she is in need of additional medical treatment.

With reference to Claimant’s transferrable skills and her residual work capacity, it is now well-settled that an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the

employee's physical limitations, so long as the job is necessary and Claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider Claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because she does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS 327 (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If Claimant cannot return to her usual employment as a result of her injury but secures other employment, the wages which the new job would have paid at the time of Claimant's injury are compared to the wages Claimant was actually earning pre-injury to determine if Claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is also well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages Claimant received in her usual employment pre-injury and the wages Claimant's post-injury job paid **at the time of her injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33

(1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his/her injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar, Ms. Laura C. Whitfield, B.S., M.S. Ed., C.R.P., the Employer’s Vocational Consultant, has issued a

report dated June 18, 1999 (EX 4) wherein Ms. Whitfield opines that Claimant has the transferrable skills and residual work capacity to work full-time as an unarmed security guard, a cashier, a front desk clerk and as a merchandise associate. Ms. Whitfield sent the job specifications to Dr. Daniel T. Glenney, the Employer's physician, and the doctor, as of July 15, 1999, approved the following jobs as suitable for Claimant. (**Id.**)

Company	Title	Wages Per Hour
T.J. Maxx	Merchandise Associate	$5.65
Alden Associates	Cashier	$7.00
Radgowski's Deli	Cashier	$5.50
Olympic Inn	Font Desk Clerk	$7.50

(I note that the doctor first checked the "No" block, then crossed it out and checked the "Yes" block.)

Super 8 Motel	Front Desk Clerk	$7.25

(I note that Dr. Glenney again checked the "No" block, apparently because of "too much" sitting, the crossed out that entry and checked the "Yes" block.)

Atlantic Security Guards	Unarmed Security Officer	$6.50

(I note that there are two sheets for this proposed position, that the doctor checked the "No" block on the second sheet because he questioned whether or not Claimant could endure the prolonged sitting required for such work. The first sheet contains the "Yes" block checked thirteen (13) days later.

Ace Security	Unarmed Gate Guard	$7.00

(Likewise there are two sheets for this job. The doctor first doubted that Claimant could sit that long and then thirteen (13) days changed his mind and approved the job.)

Econolodge	Front Desk Clark	$5.50

(Likewise there are two sheets for this proposed position. The doctor questioned whether the sitting required “May be too much.” He then changed his mind thirteen (13) days later and approved that job.)

Boardson Associates	Unarmed Security Guard	$7.00

I note that in those instances where Dr. Glenney changed his opinion, he did so after receiving the July 21, 1999 letter from Ms. Whitfield wherein she clarified the job duties as she understood them to be. (EX 5)

As indicated above, the Employer has offered a Labor Market Survey (EX 4 and EX 5) in an attempt to show the availability of work for Claimant as a cashier and a front desk clerk and merchandise associates and as an unarmed security guard. I cannot accept the results of that very superficial survey which apparently consisted of the counselor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can do that work.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (EX 4 and EX 5) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of the jobs identified by Ms. Whitfield, and whether such work is within the doctor's physical restrictions. Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs at the firms identified by Ms. Whitfield. I also note Dr. Glenney's ambivalence as to whether Claimant can perform those jobs, and I find and conclude that Claimant cannot perform those jobs.

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, **suitable** alternative employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Claimant cites the **Abbott** case as support for her ongoing entitlement to temporary total disability benefits herein despite the Employer's Labor Market Surveys. As an alternate ground to find Claimant still temporarily and totally disabled, I shall now resolve this issue.

The Board has also held that a claimant may continue to receive total disability benefits even in those cases where an employer has established the availability of suitable alternate employment at a minimum wage level, but where claimant is precluded from working because he/she is undergoing vocational rehabilitation. **Abbott v. Louisiana Insurance Guaranty Association**, 27 BRBS 192, 201-203 (1993), **aff'd**, 29 BRBS 22 (CRT)(5th Cir. 1994). In **Abbott**, the Board affirmed the remedy fashioned by my distinguished and late colleague, Judge Ben H. Walley, as "it comports with the fundamental policies underlying the statute and its humanitarian purposes. **Abbott**, **supra** at 203.

I agree completely with Claimant's vocational rehabilitation counselor, David M. Soja, CRC, ABVE, a well-recognized expert in his field of speciality. Initially I note Mr. Soja's **Curriculum Vitae** wherein he indicates that he has received a bachelor's

degree, as well as two masters' degrees, has been "(c)ertified as a Vocational Rehabilitation counselor and provider of services by the U.S. Department of Labor's Office of Workers' Compensation Program" and by numerous other state and federal agencies. (CX 26) On the other hand, Ms. Whitfield's credentials are not contained in this record, other than the initials after her name on her reports. (EX 4, EX 5)

Specifically, I agree, and Claimant testified most credibly, that she "is a highly motivated individual anxious to begin the VR process despite her compensable and unrelated medical limitations involving pain and loss of motion." (CX 9)

Furthermore, Mr. Soja and Dr. Tolsdorf agree that Claimant should be retrained for work "dealing with the public" (CX 10-4), and I agree completely because Claimant testified most credibly before me and because her demeanor and appearance have led me to conclude that she will succeed in the field of hotel management and/or the hospitality industry, especially as she is so highly motivated and as she sought to retrain herself through her own efforts. Moreover, Claimant was so highly-motivated in her retraining efforts that she advanced her June, 2001 completion date at TRTC by taking extra courses during each semester and during the summer, and she has done so despite experiencing continued pain symptoms that require her to stand as needed in the classroom. Claimant has done academically and she will soon complete her studies and receive her Certificate.

Accordingly, in vie of the foregoing, I find and conclude that this claim falls within the rule of law enunciated in **Abbot, supra**, that Claimant shall be allowed to complete her studies and obtain gainful employment in hotel management/hospitality industry at substantially higher wages than the minimum wages suggested by Ms. Whitfield in her now rejected Labor Market Surveys. (EX 4, EX 5)

Accordingly, I find and conclude that Claimant is still temporarily and totally disabled, that such status shall continue until further **ORDER** of this Court and that she shall receive an award of appropriate benefits for such disability, based upon her average weekly wage as determined in the next section.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export**

Co., 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the 22 vacation days as time which claimant actually worked in the year preceding her injury, giving her a total of 212 days worked in the 52 weeks before her injury. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the 52 weeks prior to the date of her injury on June 9, 1997. (EX 7) Therefore Section 10(a) is applicable.

Claimant’s prior attorney, also with Attorney Kelly’s law firm, as well as the Claimant, signed a stipulation that she was entitled, as of December 4, 1998, to temporary total disability from October 2, 1997 through the present and continuing at the weekly rate of $283.60, apparently based upon an average weekly wage of $425.40.

Claimant, alleging that average weekly wage is erroneous, now wishes to withdraw from such stipulation. As could be expected, the Employer objects to increasing the average weekly wage because of the parties’ agreement on that issue on December 4, 1998. (I note that that document (EX 1) was drafted by the Employer’s prior attorney who had his office at the time in Jersey City, New Jersey.

Initially, I note that the record does not reflect whether or not that alleged “stipulation” was approved and/or ratified by the District Director for Region I. While the claim was pending before the Office of Administrative Law Judges, the parties requested that the claim be remanded to the District Director (EX 1)

It is well-established that I should not accept a stipulation that is contradicted by a document in evidence, especially in resolving a claim based upon this humanitarian and beneficent statute.

Accordingly, Claimant is permitted to withdraw from that alleged “stipulation” as Claimant’s wage records (EX 7), pursuant to Section 10(a) establish an average weekly wage of $522.70 (CX 23), and I so find and conclude. In this regard, **see Dodd v. Newport News Shipbuilding and Dry Dock Co.**, 22 BRBS

245 (1989); **McCullough v. Marathon Letourneau Co.**, 22 BRBS 359 (1989). **See also Puccetti v. Ceres Gulf**, 24 BRBS 25 (1990). The parties were advised at the hearing that Claimant's withdrawal from that alleged stipulation would be accepted if that stipulation were contradicted by a document in evidence, and clearly such is the case in the case at bar. (TR 20-21)

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District
Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to the Claimant and timely controverted her entitlement to additional benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has

been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her work-related injury on or about June 9, 1997 (CX 1) and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care, certain medical care and treatment has been denied by the Employer, and there is an outstanding bill from Dr. Kleeman totaling at least $2,125.00 as of May 19, 2000. (TR 9) Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Dr. Kleeman, Dr. Radin and Dr. Miller are in agreement that Claimant needs additional medical care and treatment. In fact, Dr. Radin, as of January 15, 1998, opined that Claimant would require additional counseling because of the psychological problems caused by the combination of her work-related stress,

i.e., her inability to return to work as a barber, the forced sale of her condominium and being forced to return to live with her parents, and other personal issues. (CX 2, CX 3, CX 4)

I note that Dr. Krompinger saw Claimant only one time (on November 10, 1997) (EX 2) and Dr. Glenney likewise saw Claimant once on February 23, 1999. (EX 3)

Accordingly, I give greater weight to the well-reasoned and well-documented opinions of Dr. Kleeman who has examined Claimant many times between June 9, 1997 and May 19, 2000 and whose unpaid bill totaled $2,125.00 as of that latter visit. (CX 2, CX 21) In this regard, **see Pietrunti, supra**, and **Amos, supra.**

Moreover, Claimant's lack of funds has prevented her from returning to see Dr. Radin and Dr. Miller for followup.

Accordingly, the Employer shall immediately pay that outstanding bill of Dr. Kleeman and shall also authorize and pay for that further treatment recommended by Dr. Kleeman, Dr. Radin and Dr. Miller so that Claimant can complete her retraining in hotel management and return to work as soon as possible at the anticipated higher wages, as envisioned by Mr. Soja, so that the parties then can put this matter behind them as it is obvious that she will not be able to return to work as a barber at the Employer's facility and as C. Flanagan, the Employer's representative, advised Claimant that the Employer did not have suitable work within her physical limitations. (CX 5)

All of the above medical care and treatment shall relate to reasonable and necessary services, and shall be subject to the provisions of Section 7 of the Act.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on July 7, 2000 (CX 25), concerning services rendered and costs incurred in representing Claimant between March 12, 1999 and October 27, 1999. Attorney Carolyn P. Kelly seeks a fee of $5,976.70 (including expenses) based on 13.25 hours of attorney time and 17 hours of paralegal time at various hourly rates.

In accordance with established practice, I will consider only those services rendered and costs incurred after October 27, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

As Claimant has submitted an incorrect fee petition, I have no jurisdiction over that petition and that should be submitted to District Director Marcia D. Finn for her consideration.

Claimant shall resubmit, within thirty (30) days of receipt of this decision, a fully-itemized fee petition relating to those services rendered and litigation costs incurred after October 27, 1999, the date of the informal conference. Employer's counsel shall have ten (10) days to file a response thereto.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for her temporary total disability from October 2, 1997 through the present and continuing, based upon an average weekly wage of $522.70, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of her June 9, 1997 injury.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including authorization of and payment of the medical benefits specifically discussed above, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on October 27, 1999.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl